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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1787

PAUL JOHN SMOKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1975

No. ------

PAUL JOHN SMOKE,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner PAUL JOHN SMOKE respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 7, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. (App. A)

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1976. A petition for rehearing was denied on May 14, 1976. (App B) This petition for certiorari was filed within thirty (30) days of that date as required by Rule 22(2) of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. WHETHER A SEARCH WARRANT ISSUED BY A STATE JUDGE WHICH FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE MUST BE SUPPRESSED?

II. WHETHER AN AFFIDAVIT FOR SEARCH WARRANT BASED ON OBSERVATIONS BY A CONFIDENTIAL INFORMANT WHICH FAILS TO SATISFY THE STANDARD SET OUT IN *AGUILAR* AND *SPINELLI*, AND DOES NOT CONTAIN A DECLARATION AGAINST INTEREST, MUST LEAD TO A SUPPRESSION OF THE WARRANT?

PROVISIONS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 41(a) and (c) of the Federal Rules of Criminal Procedure provide:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.
>
> (c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence

> in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

STATEMENT OF THE CASE

On February 17, 1975 at 9:45 p.m., a federal narcotics officer executed an affidavit for search warrant (App. C) seeking to search a dwelling house in Lansing, Michigan. The agent stated in his affidavit that he had "good reason to believe" that cocaine was present at that location. In support of his belief, he reported in his affidavit that he had received hearsay from a "confidential informant" that the informant had personally observed "within the last 24 hours several ounces of cocaine at the . . . premises." (App. C; Paragraph 11) The agent failed to state reasons upon which the magistrate could determine that the *informant* was reliable. He did not even claim reliability. Instead, the agent stated two reasons in support of his conclusion that the *information* was reliable. First, he relied on personal surveillance of the house in question (App. C; Paragraph 12(a)); secondly, he referred to the fact that the informant's observations were personal. (App. C; Paragraph 12(b)).

In the affidavit, which was executed at 9:45 p.m., the agent identified himself as an "officer of Drug Enforcement Administration, Department of Justice." The affidavit was executed before a judge of a state court, who issued the warrant at 9:50 p.m. (App. D) directed "To the Sheriff or Any Peace Officer of Said County." The warrant did not command the search to be within a specified period of time not to exceed 10 days; did not authorize execution at times other than daytime; and did not designate a federal magistrate to whom it shall be returned.

No return was ever filed with a federal magistrate.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit Court Of Appeals, In Deciding The Rule 41 Issue, Has Decided A Federal Question Of Substance Not Heretofore Determined By The Supreme Court.

Rule 41(a) of the Federal Rules of Criminal Procedure provides that a search warrant may be issued by a judge of a state court within the district wherein the property is located, upon the request of a federal law enforcement officer. Rule 41(c) provides that the state judge issuing such a federal warrant must follow certain procedures, including:

(1) The warrant must be directed to "a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to any person so authorized by the President of the United States."

(2) The warrant must specifically command that the officer search within a specified period of time not to exceed 10 days.

(3) If entry is to be effected at nighttime, the warrant must specifically so authorize.

(4) The warrant must designate a federal magistrate to whom the warrant shall be returned.

The Sixth Circuit Court of Appeals found the violations of the four stated requirements of Rule 41(c) to be "concerned with form rather than substance." Finding no prejudice to the Defendant, the Court of Appeals refused to hold that such violations of the Federal Rules by a state court issued federal warrant should result in suppression.

The Court of Appeals relied on *United States* v. *Ventresca,* 380 U.S. 102 (1965) for support, refusing to apply a ". . . grudging or hypertechnical attitude toward warrants . . ." However, such reliance on *Ventresca* is misplaced, as in that case the Supreme Court was dealing with the drafting of the language of affidavits in support of search warrants, not the warrants themselves. The Supreme Court has never dealt with the substantial federal question of the effect of violations of Rule 41(c).

As early as 1926, the Supreme Court was confronted with a search warrant issued by a state judge addressed to "any peace officer of Des Moines, Polk County, Iowa." *Byars* v. *United States,* 273 U.S. 28, 71 LE 520, 47 SC 248 (1926). Although the warrant was given to a local officer, the officer invited a federal agent along and prosecution resulted in federal court for counterfeit stamps found pursuant to the warrant. The Supreme Court held that federal standards must apply to determine the legality of such a search in a federal prosecution.

The *Byars* doctrine was extended by the Court in *Lustig* v. *United States,* 338 U.S. 74, 93 LE 1819, 69 SC 1372 (1948), to a situation where the federal agent waited in the wings until the local police came upon evidence of counterfeiting and then called the federal agents to the scene.

Although the Supreme Court, through the *Byars-Lustig* rule, has made it clear that federal standards apply to a warrant obtained by *federal* agents from a *state* judge, the Court has never decided whether violations of Rule 41(c) should result in the application of the exclusionary rule. The Sixth Circuit Court of Appeals has held that it does not and hence has made meaningless the precepts of Rule 41(c). The ruling, as it stands, allows state courts to issue process under the federal rules, but allows the

state court to ignore the requirements of the same rule which allows its to function. Such a ruling is not consistent with the rulings of the Supreme Court on other aspects of the Federal Rules. In *Rea* v. *United States*, 350 U.S. 214 at 217-18, 76 S.Ct. 292 at 294, 100 L.Ed. 223 at 237 (1956), the Court stated:

> "The obligation of the federal agent is to obey the Rules. They are drawn for the innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied the policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

Rule 41(a) gives recognition to the difficulty federal agents face in attempting to locate a federal magistrate in a limited time period in order to obtain a search warrant. The Rule permits the agent to seek, in the alternative, a state court of record and obtain a *federal* warrant. In allowing a state judge the extraordinary right to issue federal process, certain procedures are mandated which preserve the integrity of the federal system. The decision by the Sixth Circuit Court of Appeals that the requirements of Rule 41(c) are of form rather than substance has far reaching ramifications in the federal criminal justice system. As it involves the Federal Rules, its effect is not limited solely to the parties involved in the present case, but becomes the rule in all federal courts in the jurisdiction of the Sixth Circuit.

2. The Sixth Circuit Court Of Appeals, In Deciding The Rule 41 Issue, Is In Conflict With Other Federal Circuit Court Interpretations Of The Rule.

The Sixth Circuit Court of Appeals refused to suppress a *federal* search warrant issued by a *state* judge on the request of *federal* law enforcement officers which failed to comply with the requirements of Rule 41(c) of the Federal Rules of Criminal Procedure. The state judge directed

the warrant to the local sheriff rather than "a civil officer of the United States"; failed to state specifically that the officer must conduct the search within a specified period of time not to exceed 10 days; failed to specifically authorize a nighttime entry; and failed to designate a federal magistrate to whom the warrant shall be returned.

These obvious violations of Rule 41(c) were determined by the Court of Appeals to be of "form rather than substance." This decision places the Sixth Circuit in direct conflict with the Fifth Circuit Court of Appeals. In *Navarro* v. *United States*, 400 F.2d 315 (5th Cir. 1968), a *local* officer obtained a search warrant from a local *state* court which was not a court of record. Federal officers joined in the search and prosecution resulted in federal court. Applying the *Byars-Lustig* rationale, the search was determined to be a federal search. The violation of Rule 41, the court of record requirement, was held to be fatal. The Fifth Circuit concluded that authority to issue warrants exists only insofar as granted by the Rules, and no further.

Several other cases have similarly held that a warrant issued by a state court which is not a court of record is impermissible under Rule 41 and must lead to a suppression of any evidence seized pursuant to such a warrant. *United States* v. *Hanson*, 469 F.2d 1375 (5th Cir. 1972); *United States* v. *Pechac*, 54 F.R.D. 187 (USDC Ariz. 1972); *United States* v. *Perez*, 375 F. Supp. 332 (USDC W.D. Texas 1974).

The Circuit Court of Appeals for the District of Columbia has not decided the Rule 41 issue directly, but it was raised in *United States* v. *Haywood*, 464 F.2d 756 (1972). As the issue was raised for the first time on appeal, the Court remanded for the lower court to hear all constitutional objections. Although the Court held that not all Rule 41 requirements are coextensive with the Fourth Amendment,

> ". . . a federal search in violation of the Rules affords an accused the right at trial to the exclusion of evidence thereby obtained . . ."

In addition to the court of record requirement of Rule 41, other precepts of Rule 41 have led to suppression when violated. See *United States* v. *Elliott*, 210 F. Supp. 357

(USDC D. Mass. 1962) (lacking in probable cause; sworn to clerk rather than judge; violation of nighttime entry requirement); *United States* v. *Brougher,* 19 F.R.D. 79 (USDC W.D. Pa. 1956) (court of record requirement and failure to give copy of search warrant or receipt); *United States* v. *Carney,* 356 F. Supp. 855 (USDC M.D. Tenn. 1973) (particularity requirement); *Application of Houlihan,* 31 F.R.D. 145 (USDC D. North Dakota 1962) (state judge issued warrant outside his district).

In 1973, the Fifth Circuit modified the *Navarro* rule in *United States* v. *Sellars,* 483 F.2d 37 (1973). If the state judge is issuing a *federal* warrant, then *all* the requirements of Rule 41 must apply. If, on the other hand, the state court is issuing a warrant under authority of state law, which is later declared to be a "federal search" due to involvement of federal officers, a different rule was held to apply. In the latter case, the Fifth Circuit refused to say that all requirements of Rule 41 apply, and held that only violations of "Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers" will lead to suppression.[1]

The Second Circuit agrees with the Sixth Circuit and also stands in direct conflict with the Fifth Circuit. In *United States* v. *Burke,* 517 F.2d 377 (1975), the Second Circuit agreed that *federal* warrants issued by a *state* judge must comply with Rule 41(c), citing *Sellars.* The Court also found that the provisions of Rule 41 requiring that the warrant be directed to "a civil officer of the United States"; that the warrant specify that the search be made within a specified period not to exceed 10 days; and that the return be made to a federal magistrate all represent a

[1] Although the case at bar is clearly a *federal* warrant rather than a *state* warrant and hence all the requirements of Rule 41 would apply in the Fifth Circuit, there is authority that the requirement of Rule 41(c) that the warrant be directed to a civil officer of the United States is such a substantive policy aimed at preserving the integrity of the federal courts or federal officers. *United States* v. *Townsend,* 394 F. Supp. 736 (USDC E.D. Mich. 1975).

"Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers." However, the Second Circuit then parts company with the Fifth Circuit, and refuses to apply the exclusionary rule, holding that such violations of Rule 41 were not of sufficient consequence to justify use of the exclusionary rule.

Two other Circuits have aligned themselves with the Fifth Circuit in adopting the *Sellars* "integrity of the federal courts" test. *United States* v. *Sturgeon,* 501 F.2d 1270 (8th Cir. 1974), cert. den. 95 S.Ct. 659 (1974) and *United States* v. *Harrington,* 504 F.2d 130 (7th Cir. 1974). Each dealt with a search warrant issued by a *state* court pursuant to *state* law, later determined to be a "federal search." Both Circuits relied on *Sellars* and determined that the various Rule 41 violations did not contravene any substantial policy "designed to protect the integrity of the federal courts or to govern the conduct of federal officers."

Thus, there exists a conflict among the Circuits in the interpretation of Rule 41 of the Federal Rules of Criminal Procedure. The various tests may be summarized as follows:

Fifth Circuit:	Federal warrants issued by state courts must comply with *all* Rule 41 requirements; state warrants issued by state courts later declared to be "federal" must only comply with those requirements designed to protect the integrity of the federal system.
Sixth Circuit:	Rule 41(c) requirements deal with form rather than substance, and violations thereof will not result in the use of the exclusionary rule, absent prejudice to the defendant.
Second Circuit:	Absent prejudice or evidence of intentional and deliberate disregard,

violations of Rule 41 alone will not lead to exclusion.

Seventh and Eighth Circuit: State warrants issued by state courts later declared to be "federal" must only comply with those requirements designed to protect the integrity of the federal system.

District of Columbia Circuit: A federal search in violation of the Rules affords an accused the right at trial to the exclusion of evidence thereby obtained.

As Rule 41 is not being uniformly interpreted among the Federal Courts of Appeal, it is not being applied uniformly throughout the federal court system. These conflicting interpretations and the resulting non-uniformity of application justify the grant of certiorari to review the judgment below.

3. The Sixth Circuit Court Of Appeals, In Upholding The Affidavit For Search Warrant, Has Decided A Federal Question Of Substance In A Way Not In Accord With The Standards Set Out In *Aguilar* and *Spinelli*.

In three major cases, the Supreme Court has delineated the law as applies to search warrants that are obtained through the use of informant hearsay. *Aguilar* v. *Texas*, 378 U.S. 108 (1963) established a two-pronged test requiring that "... the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant ... was 'credible' or his information 'reliable'."

The affidavit in the case at bar (App. C) satisfies the first prong of *Aguilar* as it does inform the magistrate of some circumstances from which the informant concluded

that narcotics were on the premises. The affiant states that the informant personally observed cocaine at the premises within the prior 24 hour period. However, the affidavit falls short of satisfying the second prong when the affiant failed completely to advise the magistrate of any facts relating to the credibility of the informant. Instead, the affiant stated two reasons in support of his attempt to convince the magistrate that the *information* was reliable. First, he cited the results of his personal observations on surveillance, and second, he cites the fact that the informant's observations were personal. The second reason properly applies to *Aguilar's* first prong, but begs the question as to the second prong.

The affiant's other reason, that his surveillance corroborates the informer tip and establishes reliability, leads us to the second major Supreme Court case on the topic. *Spinelli* v. *United States*, 393 U.S. 410 (1968). In addition to an informer's tip, the affidavit contained a report of an independent FBI investigation which was said to corroborate the tip. The Court held that the affidavit failed the two-pronged *Aguilar* test. Although the affiant swore that the informant was "reliable," he offered the magistrate no facts to support this conclusion. Finally, the Court held that the doubts as to reliability were not resolved by the purported corroboration of the FBI investigation.

The third and final major Supreme Court case on the question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the hearsay report of an informant was *United States* v. *Harris*, 403 U.S. 573 (1971). In a five to four decision, the Court upheld an affidavit based on the hearsay information of an unnamed person the affiant had found "to be a prudent person." No underlying circumstances were described to support this conclusion, in violation of *Aguilar* and *Spinelli*. However, the affidavit did state that the informant had purchased illicit whiskey from the described premises and personally observed illicit activities on the premises. The affidavit also contained some independent corroboration.

The four Justices who voted with the Chief Justice in the majority opinion did not agree on all the reasons stated in the opinion. Three Justices were critical of the *Spinelli* requirement of an averment of previous reliability and of the rejection of a policeman's knowledge of a suspect's reputation. However, two Justices did not join in this part, although they concurred in upholding the affidavit. The turning point of this affidavit seemed to be the declaration against penal interest made by the informant. Four Justices agreed that a declaration against interest was sufficient to credit the informant's tip. Justice Stewart did not join in this section, so that there was not a majority for that principle. However, in Part I of the opinion, the Chief Justice states that the declaration against interest, coupled with the corroboration and the affiant's own knowledge of the defendant's background, afforded sufficient basis upon which a magistrate could issue a warrant. Here, Justice White did not join in, but Justice Stewart does, again leaving one vote short of a majority.

In any event, the affidavit in question here does not contain a declaration against interest, and the *Aguilar-Spinelli* test is still the law. Yet, the Sixth Circuit Court of Appeals, in the decision below, ignores the two-pronged test, holding that the affidavit bears no resemblance to those found deficient in *Aguilar* and *Spinelli.* Hence, they have decided a federal question of substance, and a recurring one not completely resolved by *Harris,* in a manner not consistent with previous decisions of the Supreme Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Dated: June 7, 1976

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APPENDIX

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APPENDIX A

DO NOT PUBLISH

No. 75-2115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Defendant-Appellant.
vs.
PAUL JOHN SMOKE,
Plaintiff-Appellee,

APPEAL from the United States District Court for the Western District of Michigan, Southern Division.

Decided and Filed April 7, 1976.

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

PER CURIAM. Defendant appeals his jury conviction on a single charge of knowing possession with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1). The issues on appeal are stated in his brief as follows:

I. Did the district court err in denying the motion to suppress the evidence seized as a result of the search warrant issued by a state judge which failed to comply with the requirements of Rule 41 of the Federal Rules of Criminal Procedure?

II. Did the district court err in denying the motion to suppress the evidence seized as a result of a search warrant based on an affidavit that was insufficient to support a finding of probable cause?

III. Did the district court err in admitting Exhibit 1 into evidence as the government failed to lay a proper foundation to show that the chain of custody was complete?

IV. Was the defendant denied due process of law when Exhibit 1 was admitted into evidence for the reason that it constituted evidence of other crimes allegedly committed by the defendant and no cautionary instructions were given and it was unclear from the record whether defendant was convicted of possessing Exhibit 1, Exhibit 2 or both?

We affirm and will discuss each issue briefly.

During a series of sales of cocaine by one Bennett to an undercover agent who was a city policeman of Battle Creek, Michigan, a group of federal drug enforcement officers and state officers assigned to drug enforcement determined by surveillance that Bennett was obtaining the drugs at a residence on Gunson Street in East Lansing, Michigan. The federal officer in charge of the operation obtained a search warrant for the Gunson Street residence from a district judge of Ingham County, Michigan. The warrant was addressed to the sheriff or any peace officer in Ingham County, and after it was executed, a return was made to the court of the issuing judge. The defendant argues that the warrant was defective because it was directed to state, rather than federal officers; that it did not command that the search be made within a specified time, not exceeding 10 days; that the warrant did not authorize a nighttime entry and that it did not designate a federal magistrate to whom it would be returned.

The arguments are all concerned with form rather than substance. The warrant resulted from observations made by a group of federal and state officers working together. Rule 41 specifically permits a judge of a state court to issue a warrant. The search was conducted by state and

federal officers acting together and the warrant was executed within minutes after it was issued. At trial the parties agreed that the warrant was executed before 10:00 p.m. which is the end of "daytime" under Rule 41(h). With respect to the return of the warrant, this court has held the return to be a ministerial act, any failure of which will not affect the validity of the warrant. *United States* v. *Dudek*, ... F.2d ..... (No. 75-1547 6th Cir. Feb. 12, 1976); *Evans* v. *United States*, 242 F.2d 534 (6th Cir.), *cert. denied*, 353 U.S. 976 (1957).

The Fourth Amendment only prohibits "unreasonable searches and seizures" and the law requires that warrants be obtained prior to searches and seizures except in narrowly defined circumstances. A grudging or hypertechnical attitude toward warrants does not serve the fundamental goals of the Fourth Amendment. *United States* v. *Ventresca*, 380 U.S. 102 (1965); *United States* v. *Bowling*, 351 F.2d 236 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966). We find no prejudice to the defendant from the manner in which the search warrant was obtained, executed or returned.

The second issue relates to the affidavit upon which the search warrant was issued. The affidavit was made by one of the federal drug enforcement agents and was based on his personal observations, reports from a fellow officer whose observations were related to him and information supplied by one unnamed informant. The affidavit was extremely detailed as to the observations of the affiant himself and those of an identified state police officer. With respect to the information received from the unidentified confidential informant, the affidavit detailed the personal knowledge of the informant and recited the personal observations of the affiant which give credence to the report of the informant. The affidavit bears no resemblance to those found deficient in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969), the cases principally relied upon by the defendant. When read "in a commonsense and realistic fashion," *Ventresca*, *supra* at 108, the affidavit of special agent Young clearly established probable cause to believe that unlawfully possessed cocaine would be found upon a search of the Gunson Street premises.

The defendant makes two distinct arguments with respect to Exhibit 1, a quantity of cocaine. First, it is claimed that the government failed to show that the chain of custody was complete. The government offered this exhibit as cocaine purchased by the undercover officer from Bennett a few hours before the arrest of defendant at his residence. The federal agent in charge of the operation testified that the cocaine identified as Exhibit 1 was turned over to him by the undercover purchaser late in the evening of February 17, 1975. He identified the initials of the undercover purchaser on the containers in which the narcotic was delivered to him. Bennett testified that he received cocaine from the defendant and delivered it to the same undercover buyer. The alleged break in the chain of custody refers to Bennett's testimony when shown Exhibit 1, "This is not the bag here that I — it seems like they were bags like sandwich bags. The bag inside here is a heavier plastic. I don't know what the bags on the side here are." An examination of the entire transcript reveals that the cocaine was packaged in small clear plastic "baggies" when Bennett had it in his possession. After special agent Robins received the small sacks containing cocaine from the undercover buyer, he placed them in a heavy plastic ziplock evidence bag for safekeeping and delivery to a laboratory in Chicago. When first shown to Bennett the small "baggies" were inside the larger heavy plastic bag. Bennett's final testimony on the subject was, "These are the type of bags that were used, I believe."

The undercover officer who received the cocaine from Bennett and turned it over to agent Robins did not testify. We believe the testimony of Bennett and agent Robins, together with that of other officers who observed Bennett returning to the Gunson Street residence of defendant between deliveries of cocaine to the undercover buyer, was sufficient to validate the introduction of Exhibit 1. Even if this exhibit was erroneously received, it should be noted that defendant was convicted of a single charge of possession with intent to distribute. The government's Exhibit 2, which was identified as 84 grams of cocaine found in the

kitchen of defendant's residence is not challenged on appeal. The evidence concerning the cocaine taken from defendant's home was sufficient to support the jury's verdict.

Defendant's argument on the fourth point is not entirely clear. He contends that Exhibit 1 constituted evidence of other crimes for which he was not being tried and that it should not have been admitted without cautionary instructions. This argument is based on the fact that he was indicted for possessing approximately 160 grams of cocaine and that the district court suppressed part of the cocaine seized from the defendant's residence. He argues that he could only be tried for the unsuppressed drugs taken from his home and that these were all included in Exhibit 2. Thus, he maintains, Exhibit 1, if connected to him at all, must relate to drugs not charged in the indictment. There is no merit to this argument. Defendant was charged with one act of possession of cocaine. There was competent evidence from which the jury could readily have inferred that the cocaine which Bennett sold to the undercover officer had been in defendant's possession immediately prior to the delivery to Bennett. This act of possession was not distinct from possession of the drugs taken from defendant's home. A series of events closely related in time and involving the same cast of characters culminated in the search of defendant's residence.

When Exhibit 1 was offered in evidence the only objection voiced by defendant was ". . . there is nothing to link Exhibit 1 with my client, Mr. Smoke, based on the record here before us today." There was no claim that it related to a different offense and no request was made for any type of limiting instruction. Thereafter, at the conclusion of all the evidence defendant offered no instructions and requested none specifically. Furthermore, he made no objection to the court's charge, though given an opportunity to do so. Rule 30, Fed. R. Crim. P. provides in part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Defendant further argues that it is not clear whether he was convicted on the basis of "possession of Exhibit 1, Exhibit 2 or both." We assume that he was convicted on the entire evidence which overwhelmingly pointed to his guilt on the single charge for which he was tried. The variance in proof between the "approximately 160 grams of cocaine" charged in the indictment and the amounts introduced as Exhibits 1 and 2 is immaterial. *Berger* v. *United States,* 295 U.S. 78, 82 (1935). The defendant had clear notice of the offense with which he was charged and never claimed in the district court that Exhibit 1 related to a separate offense. The testimony surrounding Exhibit 1, and the exhibit itself were admissible as circumstantial evidence of illegal possession of cocaine by the defendant. *See United States* v. *Langley,* 466 F.2d 27 (6th Cir. 1972).

Our examination of the record on appeal, including excerpts from closing arguments included in defendant's appendix, has disclosed no instances of "plain errors or defects affecting substantial rights" of the defendant. Rule 52(b), Fed. R. Crim. P.

The judgment of the district court is affirmed.

APPENDIX B

No. 75-2115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Defendant-Appellant.

vs.

PAUL JOHN SMOKE,
Plaintiff-Appellee,

ORDER

BEFORE: EDWARDS, PECK and LIVELY, Circuit Judges.

No judge in regular active service on the court having requested consideration en banc of the petition for rehearing filed herein, the petition has been referred to the panel which heard the original appeal.

Upon examination of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the prior submission and disposition of this appeal.

Accordingly, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX C

AFFIDAVIT FOR SEARCH WARRANT

STATE OF MICHIGAN
SS
COUNTY OF INGHAM

This affidavit, on oath and in writing of Stephen A. Young, taken and made before me, a Magistrate authorized to issue Search Warrants, upon this date, the said Affiant being duly sworn says that on the premises known and described as follows: a two-story, wood-frame, single-family dwelling house, white in color, and adjacent garage located at 225 Gunson, in the City or Township of East Lansing, in said County and State, that this Affiant has good reason to believe that in said premises the following goods are located: a quantity of a controlled substance, cocaine, paraphernalia for mixing, packaging, and using the same, and evidence of such criminal conduct on the part of persons there, and several thousand dollars of recorded United States currency (all $100 denominations) and identifying articles such as drivers licences, rent receipts, and other identifying items and any notes, papers, records or other memoranda relating to the illegal narcotics transactions; and that the information supporting such belief as follows: (1) affiant is an officer of Drug Enforcement Administration, Department of Justice, and has been so for 9 years; (2) affiant has personally observed the above described premises and deposes and says that they are as described; (3) affiant has been informed by Nibley S. DiMattio, an officer of the Battle Creek City Police Department of the following:

(a) a person by the name of Howard Bradley in the company of George Bennett, met with officer DiMattio within the last 4 hours and did transfer to said officer one ounce of cocaine for a price of $2,000, said United States currency being recorded by said officer,

(b) that the same two individuals had discussed with officer DiMattio a transfer of a total of 8 ounces of cocaine, but that said transaction would take place one ounce at a time,

(c) that the same officer DiMattio arranged for the completion of the second transaction with the same two individuals at which time (within the last 2½ hours) one of the individuals, Gregory Bennett, left the area for the purpose of procuring another ounce of cocaine;

(4) affiant believes officer DiMattio because said officer has been a police officer for seven years and the information given affiant in other cases has always been accurate; (5) affiant, who was surveilling the location where officer DiMattio and the above described subjects were located and that affiant personally observed Gregory Bennett leave the company of officer DiMattio; (6) affiant followed Gregory Bennett, who was driving a white and blue Ford Mustang LVC 734 and did keep that vehicle within observation until it reached 225 Gunson, at which time affiant personally observed the same Gregory Bennett enter the wood frame, two story, single family dwelling located at 225 Gunson, City of East Lansing; (7) affiant did then observe Gregory Bennett leave the same premises within five minutes and proceed in the same vehicle back to the location where he had left, the place where he had met with officer DiMattio; (8) that in his returning to the premises Gregory Bennett did not take the shortest route, but made many side trips on the return; (9) affiant did personally observe Gregory Bennett come in contact again with officer DiMattio; (10) officer DiMattio did inform this affiant that after his return, Gregory Bennett did turn over to him another ounce of cocaine in exchange for $2,000 in recorded United States currency; (11) affiant has also been informed by a confidential informant that he (CI) has observed personally within the last 24 hours several ounces of cocaine at the above described premises; (12) affiant believes this information to be reliable for the following reasons:

(a) within the last 24 hours, affiant has personally observed and been informed of the transfer of several ounces of cocaine to a fellow narcotics officer after subjects visited the above described premises,

(b) observations described by said informant were personal observations and not hearsay;

(13) affiant, who has been a narcotics agent for nine years, knows from experience that the purveyor of this type of controlled substance (cocaine) would not carry said substance on his person or in his automobile due to the risk of apprehension and the high market value of the substance; (14) affiant, based on his experience and the particular circumstances of this transaction, believes that the cocaine involved was obtained at and still remains at the above described premises; (15) affiant believes that the above described information alleges a violation of 21 U.S.C. §841(a)(1); (16) affiant states that references above to recorded United States currency refers to currency with serial numbers recorded.

WHEREFORE, your said Affiant prays that a warrant may issue, directed to the Sheriff or any Peace Officer of said County, according to the statute in such case made and provided, commanding him to forthwith search the said premises hereinbefore described, and to seize and take into his possession and control the said evidence hereinbefore described and then to safely keep and maintain and to make immediate return on said warrant.

_____

Affiant

Subscribed and sworn to before me this 17th day of February, 1975.

_____

District Judge, acting in and for the ..... Judicial District, County of Ingham, State of Michigan.

APPENDIX D

SEARCH WARRANT

STATE OF MICHIGAN

ss.

COUNTY OF INGHAM

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

THE ATTACHED AFFIDAVIT having been sworn to by the affiant, Stephen G. Young, before me this day, based upon the facts stated therein, probable cause having been found, in the name of the People of the State of Michigan I command that you enter the following described place: a two-story, wood-frame, single-family dwelling house, white in color and adjacent garage located at 225 Gunson, in the City or Township of East Lansing, in Ingham County, State of Michigan, therein to search for, seize, secure, tabulate and make return according to law the following property and things: a quantity of a controlled substance, cocaine, paraphernalia for mixing and packaging and using the same and evidence of such criminal conduct on the part of persons there and several thousand dollars of recorded United States currency (all $100 denominations) and identifying articles such as drivers licenses, rent receipts and other identifying items.

ISSUED UNDER MY HAND THIS 17th day of February, 1975.

District Judge acting in hand and for the .....

Judicial District or the City of

County of Ingham, State of Michigan.

Supreme Court, U. S.
FILED
AUG 2 1976
MICHAEL RODAK, JR.

No. 75-1787

In the Supreme Court of the United States

OCTOBER TERM, 1976

PAUL JOHN SMOKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1787

PAUL JOHN SMOKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the search warrant that led to the seizure of crucial evidence against him was invalid because (1) it failed to comply with the requirements of Rule 41, Fed. R. Crim. P., and (2) the affidavit upon which it was based was insufficient to support a finding of probable cause.

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and fined $5,000. The court of appeals affirmed (Pet. App. 16-21).

The cocaine (together with other evidence) was seized at petitioner's residence pursuant to a search warrant issued by a state district judge at the request of a federal agent. The warrant was directed to "the sheriff or any peace officer" of the county (Pet. App. 26). The agent's affidavit (Pet. App. 23-25)—which alleged a probable violation of federal law (Pet. App. 25)—was based primarily upon the agent's personal surveillance of the activities of a vendor of cocaine to an undercover local police officer. The agent's observations revealed that petitioner's house was the source of the cocaine.[1] The affidavit also stated that a confidential informant had personally observed cocaine in the house within the previous 24 hours. The warrant was executed immediately by federal agents and local officers acting jointly, and a return was made to the court of the issuing judge (see Pet. App. 17-18).

1. Petitioner argues that the warrant failed to conform to Rule 41 requirements because it did not specifically authorize a nighttime entry, did not require execution within ten days, was directed to a state rather than a federal officer, and was not returned to a federal magistrate.

There was no need for the warrant to authorize a nighttime entry, since, as the court of appeals stated (Pet.

[1]The agent averred that, within the previous four hours, two individuals had met with the undercover officer and transferred to him an ounce of cocaine for the price of $2,000. The men had then discussed the transfer of eight ounces of cocaine, with the understanding that the transactions "would take place one ounce at a time." One of the individuals then left to procure a second ounce of cocaine. The agent followed him to petitioner's residence, where he remained for a brief period. The individual then returned to the undercover officer by a circuitous route and provided him with a second ounce of cocaine in return for $2,000 (Pet. App. 23-24).

App. 18), it "was executed before 10:00 p.m. which is the end of 'daytime' under Rule 41(h)." The other variances from the Rule's requirements, as the court of appeals correctly held, "concerned * * * form rather than substance" (Pet. App. 17) and did not result in any prejudice to petitioner (Pet. App. 18). Thus, while the warrant did not specify that he search must be conducted within ten days, it was obvious from the circumstances that the agents intended to carry out the search promptly, and in fact the warrant was executed almost immediately upon its issuance.

The requirement that warrants for federal searches be directed to federal officers is intended to "insur[e] some measure of control in purely federal matters to federal officers." *United States* v. *Townsend*, 394 F. Supp. 736, 750 (E.D. Mich.). Here, control by federal officers was in fact maintained since, despite the formal language of the warrant, they participated with local officers in the search. Moreover, the federal and local officers were working together pursuant to a program established by Executive Order; the local officers were therefore persons "authorized by the President" to "assist in enforcing any law" of the United States within the meaning of Rule 41(c). See *United States* v. *Harrington*, 504 F. 2d 130, 134 (C.A. 7).

The defect, if any, in making the return to the issuing judge rather than to a federal magistrate was ministerial and did not effect the validity of the search. *United States* v. *Wilson*, 451 F. 2d 209, 214 (C.A. 5), certiorari denied *sub nom. Fairman* v. *United States*, 405 U.S. 1032; *United States* v. *Harrington*, *supra*, 504 F. 2d at 134; see also *United States* v. *Sturgeon*, 501 F. 2d 1270, 1275 (C.A. 8), certiorari denied, 419 U.S. 1071.

In sum, under either the test of *Harrington, United States* v. *Sellers*, 483 F. 2d 37, 44 (C.A. 5) and *Sturgeon*, 501 F. 2d at 1275—*i.e.*, whether the Rule 41 provision violated "is a technical one which blueprints the procedure for the issuance of federal warrants" rather than one "designed to protect the integrity of the federal courts or assure reasonableness on the part of federal law enforcement officers"—or the test of *United States* v. *Burke*, 517 F. 2d 377, 386-387 (C.A. 2)—*i.e.*, whether "there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed or * * * there is evidence of intentional and deliberate disregard of a provision in the Rule"—no showing was made here requiring application of the exclusionary rule.

2. Petitioner argues that the affidavit was insufficient because it did not set forth facts adequately justifying the conclusion that the informant was credible. The test for the sufficiency of an affidavit, however, is whether it "demonstrates the existence of probable cause" (*United States* v. *Ventresca*, 380 U.S. 102, 109) by detailing "facts or circumstances" (*Nathanson* v. *United States*, 290 U.S. 41, 47) that provide a "sufficient basis upon which a finding of probable cause could be made" (*Giordenello* v. *United States*, 357 U.S. 480, 486). Here, the agent's own observations (see note 1, *supra*) provided sufficient facts and circumstances, without reference to the informant's tip, to demonstrate the existence of probable cause. This is not a case like *Aguilar* v. *Texas*, 378 U.S. 108, where the affidavit was based entirely upon an informant's tip (see 378 U.S. at 109), or *Spinelli* v. *United States*, 393 U.S. 410, where the tip was "a necessary element" (see 393 U.S. at 415) without which "probable cause could not be established" (*id.* at 414).

Moreover, *Aguilar* requires no more than an *alternate* showing that the informant "was 'credible' *or* his information 'reliable' " (378 U.S. at 114; emphasis added). In contrast to *Spinelli*—where the informant's tip was a simple conclusory statement (see 393 U.S. at 414) that failed to detail "the manner in which the information was gathered" (*id.* at 416) and where the surveillance offered as corroboration reflected "only innocent-seeming activity and data" (*id.* at 413-414) containing "no suggestion of criminal conduct when taken by themselves" (*id.* at 418)—the reliability of the informant's tip here was supported both by the fact that the informant purported to relate what he had personally observed and by the agent's own observations, which, taken together with information supplied by the undercover police officer (see note 1, *supra*), "clearly established probable cause to believe that unlawfully possessed cocaine would be found upon a search of [petitioner's] premises" (Pet. App. 18-19).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

DOJ-1976-08